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Filed

APR 07 2008

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7 RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE
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10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION
13
14

15 In re:) Class Action
16 PALM TREO 600 and 650)
LITIGATION) No. 05-03774 RMW
17)
18) OBJECTION AND NOTICE OF
19) INTENTION TO APPEAR AT HEARING
20) ON PROPOSED SETTLEMENT AND AWARD
21) OF ATTORNEYS' FEES AND EXPENSES
22)
23)
24)
25)
26)
27)
28)

Date: May 23, 2008
Time: 9:30 a.m.
Dept: 6, Hon. R. M. Whyte

TO: THE CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL
PLAINTIFFS AND DEFENDANTS AND THEIR RESPECTIVE
ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to the notice issued by
this Court, dated January 28, 2008, David Brennan, who is a
member of the above-denominated Plaintiff Class (see Exhibit
A), files the following written objection to the proposed
settlement and attorneys' fee and expenses request. This Class
Member intends to appear through counsel and orally object at
the above-scheduled fairness hearing. With the Court's
permission, he anticipates that his oral presentation will not
exceed 30 minutes.

OBJECTION

Plaintiff Class Member/Objector objects as follows:

1. Lack of Proper Notice.

Class Member objects to the fee request of Class Counsel on the ground that a Rule 23 motion for attorneys' fees has not been made available to class members in a reasonable manner prior to their being required to file an objection to Class Counsel's fee request.

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) *Objections to Motion.* A class member, or a party from whom payment is sought, may object to the motion.

¹Fed.R.Civ.P. 23(h)(1) and (2) (emphasis added).

Class Member therefore requests that the Court appoint a special master on behalf of the class to evaluate the reasonableness of Class Counsel's fee and expense request.

(See also Objection No. 6, *infra*, further justifying the appointment of a special master.)

The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Fed.R.Civ.P. Rule 23(h)(4).

Class Member also requests that the Court reschedule the date of the hearing on objections to Class Counsel's attorneys' fee and expense request. Said continued hearing, to be held at

1 a reasonable time after Class Counsel have filed their fee and
2 expense application, and after Objector has had an opportunity
3 to file a comprehensive objection to Class Counsel's fee and
4 expense application.

5 In setting the date objections are due, the
6 court should provide sufficient time after the
7 full fee motion is on file to enable potential
objectors to examine the motion.

8 Report of the Judicial Conference of the United States on Class
Action Settlements (Feb. 2006), Proposed Amendments to Fed. R.
9 Civ. Proc. 23, "Class Actions," Committee Note, Subdivision
(h), ¶ 2; emphasis added.

10 Class members' due process right to be heard at the
11 fairness hearing is violated under the terms of the notice and
12 the Settlement Agreement, as class members are being obligated
13 to file their objections to Class Counsel's fee request before
14 Class Counsel's fee application is filed with the Court.

15 2. Insufficient Evidence Supporting Fee Request.

16 Class Member objects to Class Counsel's fee request
17 of up to \$1,554,000. Class Member requests that the Court
18 order Class Counsel to file their time records before any fee
19 is awarded in this litigation.

20 3. Final Fee Award Premature.

21 The final fee award should be linked to the actual
22 class member receipt of settlement benefits. Class Member
23 objects to any final award of attorneys' fees until the number
24 of class members who actually utilize settlement benefits is
25 known and considered by the Court in calculating a final
26 attorneys' fee award.

27 The relevant inquiry ... focuses a court's
28 attention on the benefits actually received and

1 used by plaintiffs, [and] will determine not
2 only the often evident threshold question of
3 eligibility for fees, but it will also be
4 critical in determining the amount of a
reasonable fee award, in that the final award
must depend on a full assessment of the extend
of the benefits received by plaintiffs.

5 (*In re Prudential Ins. co. America Sales
Practice Litig.*, 148 F.3d 283 n.116 (3d Cir.
6 1998), cert. denied, 525 U.S. 1114 (1999);
7 emphasis added.)

8 Class Member requests that no final determination of an amount
9 of attorneys' fees be made until it is determined:

10 (a) the number of class members who submit
11 valid and timely claims for cash rebates;

12 (b) the total dollar amount of money rebated to
13 class members.

14 (c) the number of class members who submit
15 valid and timely repair claims;

16 (d) the number of class members whose phones
17 are repaired pursuant to the Settlement Agreement;

18 (e) the total number of class members in a
19 class defined as:

20 all United States residents who purchased
21 in the United States a new Treo 600 or Treo
22 650 smartphone for their own use and not
for resale.

23 Numerous courts, both state and federal, academic
24 commentators, and the United States Congress have endorsed this
25 approach in awarding reasonable attorneys' fees in class
actions. See attached Addendum A.

26 It should be noted that this issue was the concern of
27 proposed changes to Rule 23 of the Federal Rules of Civil
28

1 Procedure, entitled "Attorneys Fees: New Rule 23(h)," in which
 2 the comment reads:

3 One fundamental focus is the result actually
 4 achieved for class members, a basic
 5 consideration in any case in which fees are
 6 sought on the basis of a benefit achieved for
 7 class members. See RAND, *Class Action Dilemmas*,
 8 supra, at 34-35. The Private Securities
 9 Litigation Reform Act of 1995 explicitly makes
 10 this factor a cap for a fee award in actions to
 11 which it applies. See 15 U.S.C. §§ 77z-1(a)(6);
 12 78u-4(a)(6) (fee award should not exceed a
 13 "reasonable percentage of the amount of any
 14 damages and prejudgment interest actually paid
 15 to the class").... "Coupon" settlements may
 16 call for careful scrutiny to verify the actual
 17 value to class members of the resulting coupons.
 18 (Emphasis added.)

19 For example, The Honorable Ronald M. Sabraw of the
 20 Alameda County Superior Court ordered a reporting requirement
 21 in the *Prestemon v. Echostar Communications Corp., et al.*, No.
 22 2002-053014 (Super. Ct., Alameda Cty., Cal.), class action.
 23 Judge Sabraw, in his Order dated September 3, 2004, and ruled:

24 The Court hereby approves attorney fees and
 25 costs in the sum of \$458,000.00, payable
 26 forthwith by Defendants to Plaintiff's counsel,
 27 and reserves jurisdiction to award additional
 28 fees up to \$200,000 following the accounting to
be rendered by Defendants as provided in this
Order.

29 This matter is continued for a further
 30 hearing on the accounting to be rendered herein
 31 to May 13, 2005 at 9:00 a.m. in Department 22 of
 32 the Alameda County Superior Court. The
 33 accounting ordered herein shall be filed with
 34 the Court and served on all counsel, including
 35 Objectors counsel, Mr. Schonbrun, by May 6,
 36 2005.

37 *Id.*, Order 9/3/04, Nos. 2 and 3 (emphasis added).
 38

4. Parties Required to File Class Member Participation Data.

Without regard to objection No. 3, Class Member requests that the filing of the aforementioned information be a condition of court approval. This data is necessary to protect the interests of the class and ensure the proper functioning of the class action mechanism. The late John Frank, the assistant reporter to Benjamin Kaplan, who was the drafter of Rule 23, at public hearings with regard to Rule 23 reform, noted "a tremendous absence of empiric data" regarding class action settlements.

The findings of the RAND Institute for Civil Justice in *Class Action Dilemmas, Executive Summary* 24 (1999), reflect the importance of providing data on class member settlement participation:

[J]udges should require ... reports on the process of claims administration - including the number of claims accepted and denied, reasons for denial.... These regular reports on claims administration should be available to the public for review. (*Id.* at 490.)

This need for data was echoed by the Honorable Paul V. Niemeyer,¹ at hearings with regard to Rule 23 reform:

What is stunning about the way we proceed in rule revision ... is that we do it with a tremendous absence of empiric data.

¹ Paul V. Niemeyer, Chair of the Advisory Committee on Civil Rules of Practice and Procedure to the Judicial Conference of the United States and Judge on the Fourth Circuit Court of Appeals.

1 The Federal Trade Commission supports the inclusion
2 of this type of information as part of the settlement approval
3 process:

4 Finally, in the event the Court approves ... any
5 settlement with a coupon component, we urge the
Court to require that counsel for the parties
submit detailed information about the number and
percentage of coupons redeemed, the rate of
6 redemption, and the number of coupons
7 transferred during the life of the coupons.
8 This data, which is of great interest to courts,
9 legislators, various governmental enforcement
10 agencies, legal scholars, and the community at
11 large, will assist all in assessing the efficacy
12 of nonpecuniary coupon settlements. Tracking
13 actual redemption experience, of course, would
14 be critical to implementing this approach to fee
15 approval as well.

16 *Haese v. H&R Block, Inc., et al., No. CV-96-423 (Dist. Ct.,
17 Kleberg Cty., Tex., 105th Jud. Dist.) (Federal Trade
18 Commission's Mem. P&A's as Amicus Curiae re the Proposed Class
19 Action Coupon Settlement and Pet. for an Award of Attorneys'
20 Fees, dated 6/4/03, at 31) (emphasis added).*

21 This request has been successfully raised and
22 adopted in several recent class action settlements in
23 California state courts.

24 (a) The Honorable Ronald M. Sabraw of the
25 Alameda County Superior Court ordered a reporting requirement
26 in the *Prestemon v. Echostar Communications Corp., et al., No.*
27 *2002-053014 (Super. Ct., Alameda Cty., Cal.)*, class action.
28 Judge Sabraw, in his Order dated September 3, 2004:

29 The Court having read and considered the
30 pleadings and having heard the arguments of
31 all counsel HEREBY ORDERS AS FOLLOWS:
32 1. Objectors request for an accounting of
33 benefits conferred upon the class is
34 GRANTED. The Echostar Defendants are
35 hereby ordered to render to the Court and
36 (sic) accounting of all benefits conferred

upon the class pursuant to the terms of the settlement approved by the Court. Specifically, Echostar must provide an accounting as follows:

a. The number of Claim Forms submitted by class members;

b. The number and the type of PPV Certificates redeemed by class members, for both Current Customers and Former Customers;

c. The total number of Echostar customer accounts that received a credit, whether against Subscription Fees or other charges, in whatever amount toward their accounts and the total amount of all such credits applied by Echostar on behalf of the class as a whole;

d. The number of Equipment Certificates issued and redeemed.

(Echostar need only account for redemption of Equipment Certificates if they are returned by the retailer to Echostar following purchase of equipment.)

(b) The Honorable Carolyn B. Kuhl of the Los Angeles County Superior Court ordered such a reporting request in the *Hotel Energy Surcharge Cases*, JCCP No. 4185 (Super. Ct., Los Angeles Cty., Cal.):

Mr. Schonbrun: I would like to make two points, if could. The first has to do with my request that the Court require the parties as a part of approving these settlements that the number of class members who actually take advantage of these coupons be filed with the Court.

....
The reason I make this request is a public policy reason, and it's because, as I stated in my papers, specific data on who actually takes advantage of these coupons is missing from the equation in the debate about class actions.

(Hr'q Tr. at 2:28-3:1-11.)

The Court: With regard to the number of coupons used.... It ... tells us what cash value the class members made of the case, and that could be compared to, for example, ... the fees paid in the case. And I think it is a useful exercise.

(Hr'g Tr. at 33:20-28; 34:1-2;
emphasis added.)

Coordination Proceeding Special Title (Rule 1550 (b)), No. JCCP
4185, Hr'q Tr. 10/20/02.

[Defendant] is hereby ordered to file a document reporting, to the best its knowledge, the total number of Certificates that were redeemed at [defendants'] hotels before the conclusion of the Certificate Redemption.... This document shall be filed with this Court on or before March 15, 2004.

Id., Second Amended Order of Final Judgment, ¶ 19, at 9, filed 11/12/02.

11, 12, 02.

(c) The Honorable Jack Komar of the Santa Clara County Superior Court ordered such a reporting requirement in *In re WebTV Networks Litig.*, Master File No. CV793511 (settlement fairness hearing of April 23, 2003). Judge Komar ordered the parties to the settlement to report back on August 29, 2003, to advise the court on the number of coupons requested by class members and the amount of cash paid out to class members.

The parties are directed to file a report with the Court by August 29, 2003, describing the status of the settlement distribution and claims submitted and processed.

(d) The Honorable Carl W. Holm of the San Mateo Superior Court, while not adopting objector's specific

language, nonetheless ordered a reporting requirement in the
Nuanes v. Insignia Financial Group, Inc., et al., No. 404228
(Super. Ct., San Mateo Cty., Cal.) class action. Judge Holm
ordered that "the person most knowledgeable about claims
administration is ordered to prepare and file a final
accounting with regard to disposition of the settlement fund."

(e) See also *In re California Indirect-Purchaser X-Ray Film Antitrust Litig.*, No. 960886 (Super. Ct., San Francisco Cty., Cal.), before the Hon. A. James Robertson, class counsel filed a multipage spread sheet, listing the amount of the payments received by each class member from the settlement fund.

5. The So-Called "Separate" Payment of Attorneys' Fees Is Improper.

Class Counsel are inadequate representatives of the class unless the two payments are merged.

Class Member objects to the separate payment of attorneys' fees by Defendant to Class Counsel.

Palm, Inc. will separately pay the fees and expenses that the Court awards. These amounts will not come out of any funds for payments to Class Members.

(notice, *supra*, at 9). This settlement structure is contrary to the class's interest and should be rejected by the court unless the parties agree to merge the two amounts.

The defendants and plaintiffs' counsel agreed on the record that any amount by which the fees and costs defendants agreed to pay plaintiffs' counsel exceeds the sum awarded by the court will be paid to the plaintiffs themselves.

Cisek, et al. v. National Surface Cleaning, Inc., et al., 954 F. Supp. 110 (S.D.N.Y 1997) (emphasis added).

1 (a) Class Counsel are not adequate representatives
2 of the class as long as a conflict exists.

3 In a class action, adequate representation is a
4 due process requirement and Class Counsel must represent the
5 interests of absent class members at all times. (See *Phillips*
6 *Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Matsushita*
7 *Ele. Indus. Co., Ltd. v. Epstein*, 116 S.Ct. 874, 885 (1996)).

8 An adequate representative must...be free
9 from economic interests that are
antagonistic to the interests of the class.

10 *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990) (emphasis
11 added).

12 The class's interests are sacrificed when Class
13 Counsel structures the settlement process so that their fee
14 will be negotiated after the class's settlement.

15 Adequate representation requires that
16 counsel vigorously and tenaciously protect
the interests of the class. "Vigorous" and
17 "tenacious" protection requires, at a
18 minimum, that counsel pursue their clients'
19 claims. *Epstein v. MCA, Inc.*, 126 F.3d
1235, 1255 (9th Cir. 1997) (reversed on
other grounds).

20 A separate fee negotiation is:

21 [N]ot merely "inadequate" representation,
22 it was hostile representation that served
23 the interest of counsel in getting a fee
but did not serve the interests of [their
clients]. (*Id.*).

24 A denial of adequate representation is a denial
25 of due process. A lawyer's obligation is to benefit the
26 client, not the lawyer. That is, if the attorney is better off
27 with a separate fee negotiation but a better deal will result
28 for the client if the settlement is structured as one fund, a

1 lawyer is obligated to make sure that the client's interests
 2 are advanced. The lawyer must subordinate his financial
 3 interests to those of his client's.

4 Plaintiffs' and Defendants' counsel are
 5 perfectly capable of understanding at the outset that the total
 6 cost to the Defendant is the sum of the attorneys' fee and the
 7 class recovery. Both sides understand the obvious fact that in
 8 giving the class less, there is more available to offer to
 9 plaintiffs' counsel. Therefore, Plaintiffs' counsel have a
 10 financial incentive not to drive the hardest bargain they can
 11 with regard to the class's recovery in the first negotiation.

12 Such a divergence of financial interest between
 13 the client and the lawyer is a paradigmatic conflict of
 14 interest. Rule 23(a)(4) simply does not permit an attorney to
 15 represent the class if he suffers from such a conflict of
 16 interest. It does not matter that Class Counsel negotiated a
 17 reasonable settlement. Rule 23(a)(4) regarding adequacy of
 18 representation is concerned with procedural safeguards.

19 Even if, arguendo, the settlement was adequate,
 20 an unconflicted attorney might have negotiated for more. It is
 21 the mere possibility that Class Counsel may negotiate to
 22 further their own interests rather than the interests of the
 23 class which makes his representation inadequate. As counsel
 24 for the class, their sole concern must be the best interests of
 25 the class. Class Counsel are not championing the cause of the
 26 class when they negotiate their fee after the class's recovery.

27 While the conflict between a class and its
 28 attorneys may be most stark where a common
 fund is created and the fee award comes out
 of, and thus directly reduces, the class

1 recovery [the negotiation of the attorneys'
 2 fee by the parties subsequent to the class
 3 negotiation will reduce the amount of the
 4 money which the defendants intend to make
 5 available to the class], there is also a
 6 conflict inherent in cases like this one,
 7 where fees are paid by an adversary from
 8 its own funds -- the danger being that the
 9 lawyers might urge a class settlement at a
 10 low figure or on a-less-than optimal basis
 11 in exchange for red carpet treatment on
 12 fees.... It is because of the potential
 13 risk that plaintiffs' attorneys and
 14 defendants will team up to further
 15 parochial interests at the expense of the
 16 class that the Rule 23(e) protocol employed
 17 by several circuits explicitly includes
 18 scrutinizing settlements for indicia of
 19 collusion....

20 *In re Chambers Development Sec. Litig.*, 912 F. Supp. 852 (W.D.
 21 Pa. 1995), at 865 (emphasis added).

22 The plaintiffs' attorneys negotiating the
 23 settlement, on the other hand, were subject
 24 to an obvious conflict of interest with the
 25 class in making the allocation.

26 ...
 27 These two amounts together constituted one
 28 recovery fund from the viewpoint of the
 29 defendant who could have little interest in
 30 its allocation between the attorneys and
 31 their clients.

32 *Schlensky v. Dorsey*, 574 F.2d 131, 150 (1978) (emphasis added).

33 This situation may raise a serious ethical
 34 concern, as two circuits have cautioned,
 35 because class counsel would be placed in
 36 the position of negotiating a fee
 37 ultimately destined for his pocket at the
 38 same time that all thoughts ought to be
 39 singlemindedly focused on the client's
 40 interests.

41 *Obin v. District No. 9 of the Int'l Assoc. of Machinists and*
 42 *Aerospace Workers*, 651 F.2d 574, 582 (1981).

1 Class Counsel have abandoned the class in order
 2 to pursue a settlement structure in which they would be
 3 representing their own interests in a separate fee negotiation
 4 when they should be representing their clients at all times.

5 When counsel for the [plaintiff] class
 6 [negotiates their fees after the class's
 7 recovery], there is inherent conflict of
 8 interest. The defendant, and therefore its
 9 counsel, is uninterested in what portion of
the total payment will go to the class and
 10 what percentage will go to the class
 11 attorneys; accordingly, the defense
 12 operates as no brake against the invidious
 13 effects of such a conflict of interest.

14 *Piambino v. Bailey*, 757 F.2d 1112, 1143 (1985) (emphasis
 15 added).

16 The Court must recognize that regardless of how
 17 well-intentioned Plaintiffs' counsel may claim to be, this
 18 structure benefits Class Counsel at the expense of the class.

19 Yet to some extent the wool can be pulled
 20 over the court's eyes if the parties
 21 negotiate an agreement under which legal
 22 fees will be paid separately by the
 23 defendants.

24 John C. Coffee, Jr., *The Unfaithful Champion*, *supra*, p. 7
 25 n.102 (emphasis added).

26 The following representation to the Court by
 27 defense counsel Charles Schwartz in the *Horizon Healthcare*
 28 *Corp. Litigation* sums up the impropriety of Class Counsel's
 29 conduct:

30 Your Honor, I have, from the very
 31 beginning of this litigation, ...never
 32 engaged in any discussions with the counsel
 33 regarding payment of attorneys' fees from
 34 my perspective. I think that's
inappropriate for a defendant's

representative to negotiate over [the amount of class counsel's fees]....

That [the subject of attorneys' fees], respectfully, Your Honor, is a responsibility of the Court under Rule 23(e), and is a matter between the class and its counsel. And, therefore, it is the appropriate position for the defendants and the defendants' counsel not to be involved in questions of agreement of amount of attorneys' fees and the like.... In fact, that's one of the reasons that some objectors object to settlements, because the defendant was involved in the question of attorneys' fees.

So I have not negotiated over the amount of attorneys' fees....

In re Horizon/CMS Healthcare Corp. Sec. Litig., No. 96-0442-BB/LCS (D.N.M.), Transcript of Fairness Hearing Proceedings, 9/12/97, at 103 (emphasis added).

A fiduciary acts solely for the interests of the person whom they have agreed to represent.

He who is in a fiduciary position cannot serve himself first and his cestuis second.

....
It [the position as fiduciary] may not be
exercised for the aggrandizement,
preference or advantage of the fiduciary to
the exclusion or detriment of this cestuis.

Pepper v. Litton, 308 U.S. 295, 311 (1939).

A person is a fiduciary who is invested with rights and powers to be exercised for the benefit of another person.

H.C. Black, DICTIONARY OF LAW (The Law Book Exchange 1991), at 490, definition of "Fiduciary" (emphasis added).

27 The enforcement of an attorney's fiduciary
28 responsibilities are of the utmost importance:

As Judge Frankfurter observed, "From a profession charged with such responsibilities, there must exacted...the strictest observance of fiduciary responsibility...."

Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (concurring opinion) (emphasis added).

A lawyer is a fiduciary of his client and...is presumptively barred from self-dealing at the expense of the person to whom he stands in a fiduciary relationship.

(Maksym v. Loesch, 937 F.2d 1237, 1241 (7th Cir. 1991) (emphasis added)),

particularly in the class action context:

[A]ttorneys...seeking to represent the class assume fiduciary responsibilities to the class...."

NEWBERG ON CLASS ACTIONS (3d ed.), Ch. 15, § 1503, *Relationship Between Class Representative or Counsel and Absent Class Members* (emphasis added).

(b) The Two Payments Must Be Merged into One Common Fund.

A simple way to rectify Class Counsel's improper conduct would be to merge both payments by the defendants into one fund for the class, as suggested in the MANUAL FOR COMPLEX LITIGATION. Absent such a change, Class Counsel have violated their responsibility under Fed.R.Civ.P. 23(a)(4) -- failure to provide adequate representation to class members and breach of fiduciary duty to the class.

If an agreement is reached on the amount a settlement fund and separately providing an amount for attorneys' fees...the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class...

1 MANUAL FOR COMPLEX LITIGATION 3d, *Class Actions, Settlements, "Role*
2 *of the Court,"* 30.42 (Fed. Judicial Center, 1995), at 240
(emphasis added).

3 These two amounts together constituted one
4 recovery fund from the viewpoint of the
5 defendant who could have little interest in
6 its allocation between the attorneys and
7 their clients. The plaintiffs' attorneys
8 negotiating the settlement, on the other
hand, were subject to an obvious conflict
of interest with the class in making the
allocation.

9 *Schlensky v. Dorsey*, *supra*, 574 F.2d at 150 (emphasis added).

10 Any proposed settlement should be presented
11 in terms of the gross consideration to the
12 Fund or class and the matter of attorneys'
fees left for judicial determination and
award.

13 *Norman v. McKee*, 290 F. Supp. 29, 36 (1968) (emphasis added).

14 For all these reasons, class action Rules
15 should treat direct payments of fees from
the defendant to the plaintiffs' lawyers as
payments into the common fund. In
16 addition, if the defendant does not oppose
a fee below a certain amount, any fee award
17 "saved" by a successful challenge to the
award, or a *sua sponte* court reduction,
should go to the class and not the
defendant.

21 *Representing the Unrepresented*, 71 N.Y.U. L. REV. 439, at 504-05
(emphasis added).

23 All amounts to be paid by the defendants
are properly part of the settlement
funds....

25 *In re General Motors Engine Interchange Litig.*, 594 F.2d 1106
(1979), at 1130 (emphasis added).

27 See also *Bloyd v. General Motors Corp.*, 881
S.W.2d 422, 435 (Tex. Ct. App. 1994):

1 Any settlement represents a total value
 2 figure that one party is willing to pay to end the controversy. Attorneys' fees, even
 3 though they may not be technically deducted from the amount paid to the litigant,
 4 represent an integral part of the overall amount that the settling party is willing to pay, and, as such, they have a direct effect on the net amount that will ultimately be paid to the litigants.

7 (emphasis added).

8 An example of the proper payment of attorneys' fees is exemplified in the *In re Domestic Air Transportation Antitrust Litig.*, in which Class Counsel established a \$50 million class cash fund for the purpose of the court's award of reasonable attorneys' fees and reimbursement of expenses consistent with their fiduciary duty to the class.

14 VI. Cash Portion of Settlements.

15 As part of the settlements, settling defendants have deposited a total of \$50 million into escrow accounts.

16 ...Plaintiffs' attorneys will apply to the court for an award of reasonable attorneys' fees and for reimbursement of costs and expenses of the litigation...to be paid from the cash portion of the settlements....

21 *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991).

22 The reasons for the class cash fund were expressed as follows:

23 ...[I]n the negotiations which [class counsel] has described to you...for the settlement of this litigation...plaintiffs...early in the negotiations but very firmly advanced the proposition that they were not, for ethical reasons and for conflict of interest

1 reasons, subjecting...any portion of their
2 fee to negotiation [with] defendants....

3
4 We respected the ground on which they
5 made that statement, the ethical
6 concerns that supported it, and, so,
7 from the defendants' standpoint -- the
8 plaintiffs' entitlement to fees -- we
9 have taken the position is not our
 business and should not be....

10 *In re Domestic Air Trans. Antitrust Litig.*, No. 1:90-CV-
11 2485-MHS (N.D. Ga.) (Trans. Proc. before Senior Judge
12 Marvin H. Shoob, Nov. 30, 1992, at 31-32 (emphasis added).

13 6. An additional reason for the appointment of a
14 special master is the language in the notice which reads:

15 (a) If you want to be represented by your own
16 attorney, you may hire one at your own
17 expense.

18 Class Member objects to this language in the notice. It
19 unnecessarily discourages class members from fully
20 participating in the fairness hearing. Objector could be
21 entitled to have their counsel's fee and expenses reimbursed by
22 court order. The language in the notice is incorrect,
23 misleading, and contrary to the interests of class members and
24 the effective functioning of the class action mechanism.
25 This statement constitutes misinformation in that the Court has
26 the power and authority to award reasonable attorneys' fees to
27 counsel for any class member objector.

28 (b) The objection and any supporting papers must be
29 mailed to and actually received by each of the
30 following no later than April 7, 2008:

31 (notice at 9).

1 Class Member objects to the above-referenced notice
2 provision that requires actual receipt of copies of the
3 objection on the date the objection is to be filed with the
4 court. This direction is confusing and unnecessarily
5 burdensome. Objectors should only be required to provide proof
6 of service of mailing by a certain date. There is no reason
7 why class members should be held to a more onerous standard
8 than attorneys regarding proof of service for a pleading filed
9 with a Court.

10 7. Class Member objects to any settlement provision that
11 requires class members to monitor the settlement Web site in
12 order to obtain settlement benefits.

13 Check the website (www.palzasettlement.com) to learn
14 when the Effective Date has occurred to determine
when your right to repair will expire.

15 (notice at 6).

17 8. Class Member objects to the request that he
18 provide his current address and telephone number in a
19 public pleading. Such a request is inconsistent with the
20 privacy protections that should be accorded class members.
21 His address and telephone number are known to the Defendant
22 or, if necessary, can be obtained from his counsel.

23 Dated: April 4, 2008

Respectfully submitted,

Laurence W. Schanberg

Lawrence W. Schonbrun
Attorney for Plaintiff Class
Member/Objector David Brennan

PROOF OF SERVICE

I declare that:

I am employed in the County of Alameda, California. I am over the age of 18 years and not party to the within action; my residence address is 44 Emery Bay Drive, Emeryville, California 94608.

On April 4, 2008, I served the attached:

OBJECTION AND NOTICE OF INTENTION TO APPEAR AT HEARING
ON PROPOSED SETTLEMENT AND AWARD OF ATTORNEYS' FEES AND
EXPENSES

By Federal Express to the person set forth below by placing the original and a true copy thereof in a sealed Federal Express envelope in a designated area for express mail pickup, addressed as follows:

Office of the Clerk
U.S. States District Court for the Northern District of
California, San Jose Division
280 South First Street, Room 2112
San Jose, CA 95113

By mail on the below-named parties in said action by placing a true and accurate copy thereof in a sealed envelope, with postage thereon fully prepaid, and depositing the same in the United States Mail in Alameda County, California, to the addresses set forth below:

Ralph M. Stone, Esq.
Shalov Stone Bonner and Rocco
485 Seventh Avenue, Ste. 1000
New York, NY 10018

Penelope A. Preovolos, Esq.
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

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1 Clerk, Dept. 8
2 Hon. Ronald M. White
3 Judge, U.S. District Court for the Northern District of
California, San Jose Division
4 280 South First Street
5 San Jose, CA 95113
(courtesy copy)

6 I declare under penalty of perjury under the laws of the
State of California that the foregoing is true and correct.

7 Executed on April 4, 2008.

8 
9 _____
10 Sandra Norris

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ADDENDUM A

a) Numerous courts, both state and federal, academic commentators, and the United States Congress have endorsed the approach of calculating the final award of attorneys' fees after the number of class members who actually utilize settlement benefits is known and considered.

By conditioning the award of attorney's fees upon the claims actually submitted, the Court of Chancery exercised its discretion equitably, to correlate the attorneys' compensation with the structure of the settlement benefits the attorney had negotiated for the class.

Goodrich v. E.F. Hutton Group, Inc. (Del. Supr.), 681 A.2d 1039 (1996), at 1049) (emphasis added).

Staging the fee award in this manner will ... help ensure that the fee award is proportionate to the actual value created for the class ... [and] will emphasize the principle that in class actions the interests of counsel who negotiate settlements should align with the interests of the class.

Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375, 380 (D. Mass. 1997) (emphasis added).

[O]ne should nevertheless ask whether a rule of law that would hold that there is an entitlement, on the part of class counsel, to a legal fee fixed in relation to a maximum available fund rather than benefits actually realized by class members, would be a desirable general rule.... In my opinion, the answer is certainly no.

Wise v. Popoff, 835 F. Supp. 977, 981 (E.D. Mich. 1993) (emphasis added).

[The language in the PSLRA] is intended to prevent the payment of attorney's fees based on an inflated settlement figure, where a large part of the settlement is later returned to the coffers of the settling defendant because of a low number of claims. Before awarding fees, therefore, the Court must determine what portion

1 of the settlement fund will actually be paid to
2 plaintiffs.

3 *Lyons v. Scitex Corp.*, 987 F. Supp. 271, 279 (S.D.N.Y. 1997)
4 (emphasis added).

5 I am not confident of the redemption rate that
6 has been projected and thus of the settlement's
7 total value. Therefore I have determined to
delay [the] award of attorney fees until
experience shows how many vouchers are exercised
and thus how valuable the settlement really is.

8 *In re Compact Disc Minimum Advertised Price Antitrust Litig.*,
9 292 F.Supp.2d 184, 190 (D. Me. 2003) (emphasis added).

10 This Court is concerned, however, about the
11 possibility that the actual value of the
12 settlement may fall significantly short of the
13 estimated value, thus drastically altering the
proportionality of the fee award to the benefit
actually conferred to class members.

14 *Bussie v. Allmerica Financial Corp., et al.*, No. 97-40204-NMG
15 (D. Mass. May 19, 1999), 1999 U.S. Dist. LEXIS 7793, *7
16 (emphasis added).

17 [T]o approve the fee requested provisionally,
18 permit its partial payment immediately, but
reserve the balance for payment either in full or
after any appropriate adjustment in the light of
19 actual experience under the settlement.
20 (emphasis added).

21 *Id.* at *9, citing *Hancock Fee Decision*, 989 F. Supp. at 379.

22 "The court is of the view that of substantial
23 significance is the value of the benefit actually
received by those on whose behalf the action was
24 allegedly instituted.
25

26 "The key element in assessing the reasonableness
of an attorney's fee and any adjustment made in
the amount requested is 'the relationship between
27 the amount of the fee awarded and the results
obtained.'"

28 *Clement v. American Honda Finance Corp.*, 176 F.R.D. 15, 31 (D.
Conn. 1997) (citations omitted; emphasis added).

1 Thus at this point the extent of the benefit to
 2 the class cannot be determined with any degree of
 3 exactitude. It may be that so few will
 4 receive payment (with the unused portion of the
 5 settlement fund going back to Greyhound) that the
 6 benefits to the class will be "minuscule"....
 7

8 Under the circumstances, the fee determination
 9 will be reserved until all claims of shareholders
 10 entitled to participate in the settlement have
 11 been filed and determined.

12 *Voege v. Ackerman*, 67 F.R.D. 432 (S.D.N.Y. 1975), at 436
 13 (footnotes omitted) and 437. See also *Bowling v. Pfizer, Inc.*,
 14 922 F. Supp. 1261, 1283-84 (S.D. Ohio), aff'd, 102 F.3d 777 (6th
 15 Cir. 1996) (holding back large portion of fee award until
 16 additional "future" benefits to class were actually paid into
 17 class fund).

18 In *Waters v. Int'l Precious Metals Corp.*, 190 F.3d
 19 1291, 1294 (11th Cir. 1999), cert. denied, 530 U.S. 1223 (2000),
 20 United States Supreme Court Justice Sandra Day O'Connor had the
 21 following remarks about the importance of actual utilization of
 22 class member benefits in setting reasonable attorneys' fees.
 23

24 In *Boeing v. Van Gemert*, 444 U.S. 472 (1980)....
 25 We had no occasion . . . however, to address
 26 whether there must be at least some rational
 27 connection between the fee award and the amount
 28 of the actual distribution to the class. The
 29 approval of attorney's fees absent any such
 30 inquiry could have several troubling
 31 consequences. Arrangements such as that at issue
 32 here decouple class counsel's financial
 33 incentives from those of the class, increasing
 34 the risk that the actual distribution will be
 35 misallocated between attorney's fees and the
 36 plaintiffs' recovery. They potentially undermine
 37 the underlying purposes of class actions by
 38 providing defendants with a powerful means to
 39 enticing class counsel to settle lawsuits in a
 40 manner detrimental to the class.... Although I

believe this issue warrants the Court's attention, this particular case does not present a suitable opportunity for its resolution.

Id., 530 U.S. at 1224-25 (emphasis added).

b) Numerous academic commentators on the class action mechanism support the use of evidence of actual utilization of class member benefits as a factor in setting reasonable attorneys' fees in class actions.

Professor Janet Cooper Alexander recommends:

Tie the lawyers' compensation directly to the interests of the class.

The application, briefing and hearing on the fee request should not take place until after all claims are filed, and the judge should be required to take into account the actual benefit conferred on the class (as demonstrated by the claims made)....

Janet Cooper Alexander, *Contingent Fees in Class Actions*, 47 DEPAUL L. REV. 347, 360 (emphasis added).

Professor Judith Resnick notes:

The innovation of the securities fee statute is to limit judicial discretion by requiring that fees are a percentage of monies actually received by class members, as contrasted to a percentage of a fund established.

Judith Resnick, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 UNIV. PA. L. REV. 2119, 2122-23 n.6 (2000) (underline added; italics in original).

The RAND Institute for Civil Justice notes:

To avoid rewarding class action attorneys for dubious accomplishments, judges should award fees [based upon the benefits] *actually disbursed to class members or other beneficiaries of the litigation.*"

An added benefit of linking class action

attorneys' fees to disbursements is that it would give the attorneys an interest in ensuring expeditious and effective delivery of compensation to class members.

RAND Institute for Civil Justice, "Achieving the Objectives of Rule 23(b)(3) Class Actions," at 491.

Professor John C. Coffee, Jr., in his article *Claims Made Settlement: An Ethical Critique*, NEW YORK LAW JOURNAL (July 15, 1993), "Corporate Securities," notes:

[L]awyers are fiduciaries to the class they serve, and when the fiduciary is economically indifferent to the class's success, a "moral hazard" problem arises.

....
Escrow procedures could be utilized to ensure that the attorney's return would rise and fall with the class members' recovery in order to keep their interests reasonably aligned.

Id. at 5 (emphasis added).

Professors Geoffrey P. Miller and Lori Singer note, in their article *Nonpecuniary Class Settlements*, 60 LAW AND CONTEMP. PROBS. 97, Duke Univ. Sch. of Law (Nos. 3 & 4, Summer & Autumn 1997):

As a final complication, the plaintiffs' attorneys may use the valuation potential of the settlement to shop for high fees among the different jurisdictions that can hear the case.... Again, this fee will come at expense of the class's optimal recovery because the attorneys' fee should be predicated on the actual value of the fund the class receives.

Id. at 112 (footnotes omitted).

The importance of proper incentives to class counsel was noted in the Law Review article *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997):

1 The attorneys' [fee] recovery should be tied to
 2 [the recovery] of the class; to the extent the
 3 attorneys hope to prosper in the representation,
 4 that reward should be a direct product of what
 5 they return to the class.

6

7 [It] impedes sweetheart deals by ensuring that
 8 attorneys' [fee] recoveries are directly tied to
 9 the actual return to the class....

10 *Id.* at 829 and 830 (emphasis added).

11 See Fed.R.Civ.P. 23(h) advisory committee's note;
 12 *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d
 13 844, 853 (5th Cir. 1998) (holding the trial court
 14 did not abuse its discretion in considering the
 15 actual results of the settlement). The federal
 16 Class Action Fairness Act of 2005 addresses this
 17 issue directly by tying the attorney fee award to
 18 "redeemed" coupons. Pub.L.No. 109-002, 119 Stat.
 19 4 (2005).

20 Michael Northrup, *Restrictions on Class Action Attorney Fee*
 21 *Awards*, 46 S. Tex. L. Rev. 953 (Summer 1005), at n.83.

22 c) The noted federal jurist, the Honorable John F. Grady,
 23 in his article *Reasonable Fees: A Suggested Value-Based*
 24 *Analysis for Judges*, 184 F.R.D. 131 (1999), states:

25 Is the recovery something the client is going to
 26 use? A benefit obtained for a client that is
 27 unused by the client does not justify a
 28 substantial fee.

29 d) Congress has demonstrated an a commitment to this
 30 principle in the wording of Private Securities Litigation Reform
 31 Act of 1995 (PSLRA), 15 U.S.C. §§ 77z-1(a)-(3)(B)(v)).

32 Total attorneys' fees and expenses awarded by the
 33 court to attorneys for the plaintiff class [shall
 34 be based upon] the amount of any damages and
 35 prejudgment interest actually paid to the class.

36 *Id.* at § 77z-1(a)(6) (emphasis added).

1 See also the proposed Amendment of Senator Patrick
2 Leahy to the Class Action Fairness Act of 2003.

3 Leahy's bill would deal with noncash
4 settlements – the coupon problem – by tying the
5 part of the fee paid to class counsel to the
6 value of the coupon settlements actually
7 redeemed.... Leahy's bill is backed by consumer
8 groups because it addresses [a] major problem in
9 class actions: worthless coupon settlements ...
10 said Jackson Williams, legislative counsel to
11 Public Citizen's Congress Watch.

12 "If the coupon is worthless and no one uses
13 it, the attorney gets no compensation," he said.
14 "It will force attorneys to fight the meritorious
15 cases harder, which is good for consumers and
16 good for business. Honestly, there are some
17 class actions for trivial harms and they're only
18 brought because of the possibility of a worthless
19 coupon settlement."

20
21 Marcia Coyle, *Senate Eyes Competing Class Action Bills*, THE
22 NATIONAL LAW JOURNAL (May 5, 2003).

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3 Tel: (510) 547-8070

4 Attorney for Plaintiff Class
Member David Brennan
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8

9
10 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

11 In re:) Class Action
12 PALM TREO 600 and 650)
13 LITIGATION) Case No.: C-05-03774 RMW
14) DECLARATION OF CLASS MEMBERSHIP
15) OF DAVID BRENNAN
16)
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My name is David Brennan.

1. I am a United States resident who purchased in the
United States a new ~~Treo 600~~ [Treo 650] smartphone. I
purchased this Treo smartphone for my own use and not for
resale on April 14, 2006 ②

2. As a result of this purchase (see attached), I
understand I am a member of a class defined as "all United
States residents who purchased in the United States a new Treo
600 or Treo 650 smartphone for their own use and not for
resale."

3. I have retained Lawrence W. Schonbrun as additional
counsel to represent my interests in the further proceedings in
this action.

1 4. I authorize Mr. Schonbrun to take all steps which he
2 deems necessary to protect and promote my interests in this
3 litigation, including but not limited to filing an objection on
4 my behalf.

I declare under penalty of perjury that the foregoing is
true and correct. Executed at Dublin, California, on this 3,
day of March, 2008.

David Brennan

Serial No. PTPC 03N6H 1DE

CCS8632 AUTH ID: CCS8632, STORE: 1111, OVERRIDE REASON: PRICE MATCH EQUIPMENT,
OVERRIDE FOR SKU: POTR650HK, ORIGINAL PRICE: \$499.99, NEW PRICE: \$199.99,
DESCRIPTION: PER DENIS M

04/14/2006 - 12:00:00 BAN

CCS8632 Last Bill Date 20060406, Previous Balance \$ 71.42, Total Balance Due \$ 137.89 Charges
for: 20060407 - 20060506: Recurring: \$ 65.00, Other: \$ -4.33, Usage: \$ 1.40, Payments: \$ 0.00,
Adjustments \$ 0.00, Discounts \$ 0.00, Total Estimated Amount: \$ 133.49 Estimated account Balance:
\$ 133.49

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